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No. 98-1326

In the Supreme Court of the United States

OCTOBER TERM, 1998

RITA GLUZMAN, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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Brief of Amicus Curiae Connecticut Criminal Defense Lawyers Association In Support of the Petition

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RICHARD A. REEVE
Sheehan & Reeve
105 Court Street, Suite 401
New Haven, CT 06510
(203) 787-9026

Counsel for *Amicus Curiae*

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INTEREST OF THE AMICUS

Amicus curiae respectfully submits this brief in support of the petition for writ of certiorari to the Second Circuit.[1] *Amicus curiae* Connecticut Criminal Defense Lawyers Association is a bar organization comprised of lawyers who practice criminal law in Connecticut, in both federal and state court.

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1 Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for any party authored this brief in whole or in part, and no person or entity, other than *amicus curiae*, made a monetary contribution to the preparation or submission of this brief.

Amicus curiae has a substantial interest in supporting the petition for certiorari. This case involves the federalization of domestic relations assaults, an area of criminal law that has been reserved to the states since the founding of this nation. The decision below, which upholds the statute's constitutionality on the basis that it requires that the defendant travel across state lines, is, in the view of *amicus*, the most expansive application of Congress' Commerce Clause authority to date. If allowed to stand, the Second Circuit ruling paves the way for the unlimited federal police power that this Court's *Lopez* decision was designed to prevent. Review of the decision in this case will clarify the scope and meaning of the Court's decision in *Lopez*, and will provide needed guidance to the lower courts and to the criminal defense bar.

In addition, *amicus curiae* has a substantial interest in addressing the increasing damage that the pattern of "federalization" of traditional state court offenses is inflicting upon the federal court system. This trend has given federal prosecutors virtually unlimited and unreviewable discretion to select a minute percentage of defendants involved in typical state court offenses, and "federalize" those select cases. This burgeoning pattern has clogged the federal courts with traditional state court prosecutions, which state prosecutors are well-equipped to handle. This has diverted valuable federal court resources away from areas of clear national concern, and increased the arbitrariness of decisions regarding the proper forum for criminal offenses.

The Violence Against Women Act of 1994 is a prime example of this disturbing trend. It federalizes prosecutions which have traditionally been handled by the state courts, and does so based entirely on the fortuitous crossing of state lines. It disrupts the federal-state balance in the area of law enforcement, encourages forum shopping by prosecutors, and leads to arbitrary results in similar cases. Review of this case will

resolve a split in the circuits, provide needed guidance to the lower courts, and afford the Court an opportunity to provide further amplification on the essential holding of *Lopez:* that there are cognizable limits to the federal police power, and that those limits are essential to maintain a proper state-federal balance.[2]

SUMMARY OF ARGUMENT

The Second Circuit's decision in this case should be reviewed for several reasons. First, there is now a split in the circuits regarding the constitutionality of the Violence Against Women Act, as a result of the Fourth Circuit's *en banc* ruling in *Brzonkala v. Virginia Polytechnic Institute*, Slip op. (4th Cir. March 5, 1999), and it is a split which mandates speedy resolution by this Court. Second, this case affords the Court an opportunity to provide much-needed guidance to the federal courts regarding the scope, meaning, and proper application of *United States v. Lopez*, 514 U.S. 549 (1995). Third, assuming *arguendo* that Congress has some limited authority to legislate in the area of domestic relations, this case is the ideal vehicle for resolving the question of whether Congress can so legislate, consistent with the Commerce Clause, by merely adding a requirement of "crossing state lines" to a non-commercial offense which has no substantive connection to interstate travel.

The lower court decisions in this case uphold this statute on the basis that the insertion by Congress of the requirement that a defendant charged with violating 18 U.S.C. § 2261 "travels across a state line" is sufficient under the Commerce Clause. If allowed to stand, the decision below will result in virtually no limits on Congress' power to "federalize" offenses which have traditionally been within the exclusive province of state courts.

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2 The petitioner has consented to the filing of this brief, and the request for consent is pending with the Office of the Solicitor General at the time of the printing of this brief.

decision in *Lopez*, but would conflict directly with the clear holding in *Lopez* that the federal police power is not unlimited (if government's arguments in *Lopez* were accepted, "we are hard-pressed to posit any activity by an individual that Congress is without power to regulate"). *Lopez*, 514 U.S. at 564. Moreover, if there is any area in which the federal police power should be limited, it is in the context of domestic relations laws, an area of law consistently left to the purview of the states. *Sosna v. Iowa*, 419 U.S. 393, 404 (1975).

ARGUMENT

I. THE SPLIT IN THE CIRCUITS REGARDING THE CONSTITUTIONALITY OF VAWA WARRANTS REVIEW BY THIS COURT.

While the constitutionality of VAWA has previously been the subject of substantial disagreement among judges and legal commentators, the recent Fourth Circuit decision in *Brzonkala* creates a circuit split regarding the constitutionality of this statute. In contrast to the Second Circuit *per curiam* decision in this case, which failed to address the issues meaningfully and relied entirely upon the lower court's analysis, the *en banc* 7-4 decision in *Brzonkala* contains a detailed analysis of the statute's constitutionality. The *Brzonkala* majority decision, unlike numerous decisions subsequent to this Court's *Lopez* decision, rejects the government's consistent efforts to relegate that decision to an aberrational footnote in Commerce Clause jurisprudence. Slip op. 6. The *Brzonkala* majority points out that the arguments supporting the statute, if adopted, would "convert the power to regulate interstate commerce into a general police power." Slip op. 28.

The split between the approaches taken by the Second and Fourth Circuits is reflective of the sharp division within the judiciary and among legal commentators regarding the

constitutionality of VAWA. *See, e.g., United States v. Wright*, 965 F.Supp. 1307, 1309-16 (D. Neb.), *rev'd*, 128 F.3d 1274 (8th Cir. 1997), *cert. denied*, 118 S.Ct. 1376 (1998) (Magistrate Judge and District Court conclude VAWA unconstitutional, reversed by Eighth Circuit); Houck, *VAWA After Lopez: Reconsidering Congressional Power Under the Fourteenth Amendment in Light of Brzonkala v. Virginia Polytechnic and State University*, 31 U.C. DAVIS L. REV. 625, 652 (1998) ("If *Lopez* even slightly limits Congress's power under the Commerce Clause, VAWA is an illegitimate exercise of the Commerce Clause power"); Carroll, *Women's Powerlessness Tool: How Congress Overreached the Constitution with the Civil Rights Remedy of the Violence Against Women Act*, 30 J. MARSHALL L. REV. 803, 828 (1997) (VAWA "fails to pass constitutional muster under the Commerce Clause"); but see, Winskie, *Can Federalism Save the Violence Against Women Act?*, 31 GA. L. REV. 985, 1012 (1997) (predicting that VAWA will be upheld as constitutional "due to the federal courts' hesitance to apply strictly the *Lopez* framework"); Schick, *Breaking the "Rule of Thumb" And Opening the Curtains - Can the Violence Against Women Act Survive Congressional Scrutiny?*, 28 U. TOL. L. REV. 887, 894 (1997) (predicting that VAWA will be upheld as constitutional "due to the federal courts' hesitance to apply strictly the *Lopez* framework"). The majority and dissenting opinions in *Brzonkala* themselves reflect the clear divergence of opinion, and also underscore the importance of the conflict, the issues involved, and the need for resolution by this Court.

II. REVIEW OF THE DECISION BELOW WOULD ALLOW THE COURT TO PROVIDE NEEDED GUIDANCE REGARDING THE MEANING AND APPLICABILITY OF LOPEZ.

While it initially appeared that *Lopez* would have a significant impact upon the approach taken by the federal judiciary (and in turn Congress) to the rampant federalization of

traditional state offenses, to a large degree that has not occurred. The unwillingness of the lower courts to apply *Lopez* is exemplified by the separation of the Category III *Lopez* analysis from Category I (statutes regulating the "channels" of interstate commerce) and Category II (statutes regulating the "instrumentalities" of interstate commerce) analysis. The district court decision in this case reflects the tendency to restrict *Lopez* only to cases involving intra-state activities: "*Lopez*, however, was concerned only with the third category of activity, and did not purport to affect Congress' exercise of its commerce power with regard to the regulation of the use of the channels or instrumentalities of commerce". Cert. Pet. at 10a-11a. As an initial matter, this analysis appears wrong. The constitutional issue is the applicability of the **Commerce** Clause; the requirement is not one of mere interstate travel, but rather interstate **commercial** activity.

The decision below conflicts with prior decisions of the Second Circuit in which cases labeled as Category I or II have been analyzed, and a connection to commercial activity was required. For example, in *United States v. Trupin*, 117 F.3d 678 (2d Cir. 1997), *cert. denied*, 118 S.Ct. 699 (1998), the court upheld the constitutionality of 18 *U*.S.C. § 2315 under Category I. The court upheld the statute on the ground that it was "'a regulation of the use of the channels of interstate commerce' because it is 'an attempt to prohibit the interstate transportation of a commodity through the channels of commerce'" (citation omitted). Similarly, in *United States v. Wright*, 965 F.Supp. 1307, 1309-16 (D. Neb.), *rev'd*, 128 F.3d 1274 (8th Cir. 1997), *cert. denied*, 118 S.Ct. 1376 (1998), the court determined that the Child Support Recovery Act was a Category II offense, and that it was constitutional because it was a statute that dealt with commerce. The court analyzed the issue at length, citing numerous cases defining commerce and holding that the statute in question dealt with financial transactions and implicated commerce ("Because it presupposes an order of a State court imposing an obligation to pay money, the Act concerns transactions related to economic activity"). *Sage*, 92 F.3d at 107.

The confusion regarding whether a commercial nexus is required for *Lopez* Category I and II analysis has led to the decision here. The instant statute has nothing whatever to do with commercial activity, and the decision below appears to hold that interstate travel by any person under any circumstances by definition constitutes interstate commerce. If Category I and II can be construed in such a broad manner, however, then the apparent limitations upon federal jurisdiction established in *Lopez* are illusory. Indeed, if statutes falling within Category I or Category II can focus upon non-commercial activity, then Congress could "federalize" an entire state criminal code merely by engrafting upon each statute the requirement that a defendant "cross state lines" before committing the offense.[3] Such a result would render meaningless this Court's decision in *Lopez*, and it truly would be "difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States have historically been sovereign." *Lopez*, 514 U.S. at 564.

Unfortunately, many post-*Lopez* decisions do push the Commerce Clause analysis in this direction, and resolution of the issue in this case would provide much-needed guidance. *See, e.g.*, *United States v. Kirk*, 70 F.3d 791 (5th Cir. 1995) (2-1 vote), *aff'd*, 105 F.3d 997 (*per curiam*) (*en banc*), *cert. denied*, 118 S. Ct. 47 (1997) (even split of Fifth Circuit, affirming constitutionality of 18 U.S.C. § 922(o), which prohibits the possession or transfer of a machine gun); *United States v. Bailey*, 115 F.3d 1222 (5th Cir. 1997) (18 U.S.C. § 228 [failure to pay child support for child in another state] targets the "instrumentalities" of interstate commerce; dissenting judge

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3 The inclusion of an intent element in § 2261 is of no consequence to the decision here, as the holding below rests exclusively upon the crossing of a state line. The insertion of an intent element does not render the activity commercial, and is irrelevant to the Commerce Clause analysis.

notes that under this approach, "any person moving to another state ipso facto federalizes all of his financial obligations, and 'utilizes' the channels of interstate commerce, merely by crossing a state line"). In the absence of clarification, this split will undoubtedly continue, with the government increasing its efforts to place a statute in Category I or II, Congress passing statutes that contain an interstate travel element but relate to non-commercial activity, and the lower courts avoiding the *Lopez* analysis by pigeon-holing statutes into Category I or II. This case presents an unambiguous opportunity for the Court to clarify the meaning and scope of *Lopez*. Given the significance of the issue, the split in the circuits, and the uncertainty regarding how *Lopez* is to be applied, review is of critical importance.

III. THE REQUIREMENT THAT A DEFENDANT CROSS A STATE LINE IS INADEQUATE TO ESTABLISH FEDERAL JURISDICTION.

The court below held that since the statute contains the element that a defendant cross state lines before committing the substantive offense, it passes muster under the Commerce Clause. That decision is erroneous, and if not reviewed, will constitute a substantial step toward obliteration of the "sensitive relation" between "what is national and what is local and create a completely centralized government." *Lopez*, 514 U.S. at 557, 560 at n. 3

There can be little doubt that assaults and/or murders in the domestic relations context are about as far removed from "commercial activity" as is possible. Murders in general have historically been prosecuted in state and not federal court, and Congress has "no general right to punish murder." *Cohens v. Virginia*, 19 U.S. 264 (1821). This longstanding reality is most applicable in the context of domestic relations assaults, which are almost always fueled by heated emotions and are the quintessential crimes of passion.

Insertion of the "crossing state lines" element in no way obscures this reality, and non-commercial offenses containing such a requirement do not fall within the federal police power. The fundamental flaw in the decision below is that interstate movement of a defendant is equated with interstate commerce. That flawed construction reduces the phrase "interstate commerce" to redundancy, and renders meaningless the phrase "commerce." It ignores the reality that commerce "describes the commercial intercourse between ... parts of nations ... and is regulated by prescribing rules for carrying on that intercourse." *Gibbons v. Ogden*, 22 U.S. 1, 189-90 (1824).

The conclusion that a statute containing the element of "crossing state lines" is facially valid under the Commerce Clause, without further analysis of the commercial or non-commercial character of the offense, appears to be based upon an overly broad interpretation of prior decisions of this Court, such as that in *Caminetti v. United States*, 242 U.S. 470 (1917). In *Caminetti*, the Court held that transportation of passengers in interstate commerce for illicit purposes is within the regulatory power of Congress. *Caminetti*, however, did not hold that crossing state lines itself constitutes interstate commerce. Indeed, the Court assumed in *Caminetti* that Congress could **not** prohibit a person from crossing state lines with the intent to commit an offense: "It may be conceded, for the purpose of the argument, that Congress has no power to punish one who travels in interstate commerce merely because he has the intention of committing an illegal or immoral act at the conclusion of the journey". 242 U.S. at 491. *Caminetti* simply does not support the conclusion that any federal offense which requires interstate travel falls within the Commerce Clause.

The lower court's reliance upon *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964), is similarly misplaced. The Court there evaluated the Civil Rights Act of 1964, which it found met Commerce Clause requirements because the statute

reached only business enterprises that had a direct and substantial relationship to the interstate flow of goods and people. The decision there that discrimination by hotels and motels impedes interstate travel hardly gives legitimacy to the claim that all interstate travel necessarily subjects the individual traveler to federal criminal jurisdiction.

The district court below concluded that *Lopez* does not have any impact upon statutes in which Congress "seeks to regulate persons or things in interstate commerce," Cert. Pet. at 13A, and the Second Circuit adopted that holding. Cert. Pet. at 2A. It is this holding which must be reviewed, as it leads precisely to the unlimited police power rejected in *Lopez*. Review in this case will enable this Court to determine whether insertion of the talismanic "crossing state lines" requirement insulates a statute from Commerce Clause analysis and *Lopez*. If *Lopez* is to retain any vitality, it is imperative that the Court grant review in this case.

In *Lopez*, this Court emphasized that the scope of Congress' interstate commerce powers

> 'must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government.'

Lopez, 514 U.S. at 557, quoting *Jones & Laughlin Steeel*, 301 U.S. 1, 37 (1937). The lower courts in this case have effectively ignored the holding of this Court in *Lopez*, and review of this case will resolve a split in the circuits, address an issue of major national importance, and clarify the present status of Commerce Clause jurisprudence.

CONCLUSION

For the reasons stated above, the Court should grant the petition for review of the Third Circuit's decision.

Respectfully submitted,

RICHARD A. REEVE
SHEEHAN & REEVE
105 Court Street, Suite 401
New Haven, CT 06510
(203) 787-9026

Counsel for *Amicus Curiae*